No. 92-1521

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

M/V PINE FOREST, *et al.*,

Cross-Petitioners,

vs.

NELSON R. RABY, *et al.*,

Cross-Respondents.

On Cross-Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF CROSS-PETITIONERS

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April 19, 1993

Washington, D.C. • THIEL PRESS • (202) 328-3288

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REPLY BRIEF OF CROSS-PETITIONERS FOR CERTIORARI[1]

I.

BECAUSE OF CONGRESS'S EXTENSIVE REGULATION OF THE SEAMAN'S CONTRACTUAL ACTION FOR WAGES, ATTORNEYS' FEES SHOULD NOT BE AWARDABLE IN SUCH ACTIONS IN THE ABSENCE OF LEGISLATION SO PROVIDING

The plaintiffs mischaracterize defendants' attack on the attorneys' fee award. Defendants do not argue that the fees were awarded pursuant to 46 U.S.C. §10313 and that they were therefore improper because that section does not provide for such fees. We fully acknowledge that the fees were awarded under asserted general maritime principles supposedly set down in *Vaughan v. Atkinson*, 399 U.S. 527 (1962). We also acknowledge that plaintiffs' claim for back wages stated a cause of action for breach of a maritime contract as well as for violation of subsection (f) of the Seaman's Wage Act. What we argue, however, is that in determining whether a particular remedy is available in an action for wages, one may not look only at traditional maritime contract principles, but must also look at and follow the explicit and implicit requirements of the Wage Act.

What is meant by the Seaman's Wage Act varies from context to context and speaker to speaker. For present

[1] Cross-petitioners will not generally address assertions of fact in the Brief in Opposition which they contest, since such factual issues need not be resolved to determine whether to grant certiorari. However, the Court should be aware that the only evidence at trial as to who devised the practice of double bookkeeping was from the manning agent in this case, Noimi Zabala, who testified that he, along with a manning agent in Tokyo, was its creator. Tr. 47; see also Tr. Ex. 8.

purposes, defendants will use the term to cover not only subsections (e) and (f), but the entirety of Section 10313 plus Sections 10314 and 10315. These are set out in the Appendix. The reason all of these provisions are referenced is that they all limit and control a seaman's wage remedy, irrespective of what his contract may say.

Thus, for example, Section 10313(a) determines when the employment of a seaman on a foreign vessel commences for purposes of calculating any wages due him, even if his contract stipulates a different date. Subsection (b) gives him a right to wages whether or not the vessel earns freight or if the vessel is lost, again, irrespective of the terms of his contract. Subsection (c) is especially interesting. It gives the seaman a right to one month's wages in addition to wages earned if his employment never begins or is terminated before he could have worked for one month. On the other hand, by necessary implication the subsection denies him additional damages, even if under traditional contract principles he has suffered them. He is not permitted to receive damages for any longer period of employment that he was promised, even though he cannot obtain substitute employment.

The remaining provisions of Section 10313 are of similar effect. They all impose terms of employment on the seaman, the vessel or both, irrespective of their contract. So, too, do Sections 10314 and 10315. Section 10314, for example, does not allow a seaman and a vessel to contract to pay the seaman any of his salary in advance of his earning it, even though this might in many circumstances be to the seaman's benefit – especially where he is covered by a collective bargaining contract and represented by a union.

Of course, there are important historical reasons for these statutory restrictions on the ability to contract and the remedies available for breach. But the critical point is that for whatever reasons, Congress decided to regulate the remedies for breach of a seaman's employment contract extensively. In so doing, it has given the seaman many benefits – e.g., the penalty for failing to promptly pay wages after termination of employment – and deprived him of others.

Plaintiffs now want the courts, even though none of the legislation dealing with the seaman's action for wages so provides, to grant the seaman an additional benefit – a benefit that amounts to an additional penalty for failing to promptly pay a wage claim. Surely, this is to invade an area in which Congress has substantially occupied the field and in which Congress should decide what additional regulation is required. In sum, although we agree that plaintiffs stated a claim for wages under a maritime contract, the substantial regulation of such contracts by Congress precludes the courts from granting an additional remedy for their breach without Congress's approval. *See Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) (general maritime remedies may not supplement Jones Act remedies); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978) (general maritime remedies may not supplement Death on the High Seas Act remedies). Accordingly, the Court of Appeals erred in awarding attorneys' fees.

II.
THE EXTENSION OF *VAUGHAN v. ATKINSON* TO WAGE CLAIMS CREATES A NEW EXCEPTION TO THE AMERICAN RULE AGAINST FEE SHIFTING THAT SHOULD BE ADDRESSED BY THIS COURT

Plaintiffs quote from the trial court findings that the defendants engaged in malicious and oppressive misconduct. By doing so, they hope to support the attorneys' fees award under *Vaughan*. The record, however, does not support the findings quoted. This is reflected in the Court of Appeals decision, which emphasizes the lack of record support for the mental distress, outrage, and fraud claims.

More importantly, *Vaughan* does not apply because this is not a maintenance and cure claim. If plaintiffs' characterization is accepted, it is a contract claim for breach of the shipping articles.[2] By extending *Vaughan* to a contract case, the Ninth Circuit did here exactly what Justice Kennedy in *Chambers v. Nasco* said the federal courts cannot do: It punished the defendants for breach of contract and forced them to litigate the terms of the contract at their peril. Yet the American Rule is meant to protect "each person's right to go to federal court to define and vindicate substantive rights." *Id.*, ___ U.S. ___ , 111 S.Ct. 2123, 115 L.Ed.2d 27, 64 (1991). That this case was pursued by seamen within

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[2] Defendants have not sought review of the Ninth Circuit's holding that the articles and not the individual employment contracts set the wage rates. The record establishes, however, that no party ever viewed the articles as the agreement. The defendants paid the plaintiffs the amount they had in fact been promised and to which they had in fact agreed in the individual employment contracts. In no ordinary sense, then, can it be said that defendants acted in bad faith by failing to pay a wage that plaintiffs never expected to receive.

the admiralty jurisdiction of the court does not alter the American Rule against fee shifting. In *Miles v. Apex Marine Corp.*, a seaman's case also asserting statutory and general maritime law claims, this Court noted that the federal courts "are not free to expand remedies at will simply because it might work to the benefit of seamen and those dependent upon them." 498 U.S. 19 (1990).

Plaintiffs argue that this case does not fit Rule 10 guidelines because there is no conflict in the Circuit Courts on the issues raised. Defendants point out that if the judgment is viewed as punishment for prelitigation bad faith as plaintiffs contend, then several Circuit Courts that have considered the issue conflict with the Ninth Circuit's decision in this case. The Fifth, Sixth and Eleventh Circuits have all held that prelitigation bad faith does not support an award of attorneys' fees. *See Sanchez v. Rowe*, 870 F.2d 291 (5th Cir. 1989) (attorneys' fees not recoverable despite viciousness of the assault that formed the basis of the claim); *Shimman v. International Union of Operating Engineers, Local 18*, 744 F.2d 1226 (6th Cir. 1984) (en banc) (attorneys' fees premised on bad faith in the act underlying the substantive claim reversed as inconsistent with the American Rule); *Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004 (11th Cir. 1985) (to support attorneys' fees, the bad faith must be part of the litigation process itself). These cases are not maritime cases but they are applications of the American Rule against fee shifting.

This case presents a new exception to the American Rule. Extension of *Vaughan v. Atkinson* to wage claims is contrary to the remedies for breach of the shipping articles mandated by Congress in the Seaman's Wage Act. The award also violates the prohibition against fee shifting for prelitigation conduct recognized by at least

three other Circuit Courts of Appeal. This case presents an important question of federal law that should be settled by this Court.

CONCLUSION

The Cross-Petition should be granted so that the Court can decide whether the new exception to the American Rule recognized below should be upheld.

Dated: April 19, 1993

Respectfully submitted,

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APPENDIX

46 U.S.C. §10313
Wages

(a) A seaman's entitlement to wages and provisions begins when the seaman begins work or when specified in the agreement required by section 10302 of this title for the seaman to begin work or be present on board, whichever is earlier.

(b) Wages are not dependent on the earning of freight by the vessel. When the loss or wreck of the vessel ends the service of a seaman before the end of the period contemplated in the agreement, the seaman is entitled to wages for the period of time actually served. The seaman shall be deemed a destitute seaman under section 11104 of this title. This subsection applies to a fishing or whaling vessel but not a yacht.

(c) When a seaman who has signed an agreement is discharged improperly before the beginning of the voyage or before one month's wages are earned, without the seaman's consent and without the seaman's fault justifying discharge, the seaman is entitled to receive from the master or owner, in addition to wages earned, one month's wages as compensation.

(d) A seaman is not entitled to wages for a period during which the seaman –

(1) unlawfully failed to work when required, after the time fixed by the agreement for the seaman to begin work; or

(2) lawfully was imprisoned for an offense, unless a court hearing the case otherwise directs.

(e) After the beginning of the voyage, a seaman is entitled to receive from the master, on demand, one-half of the balance of wages earned and unpaid at each port at which the vessel loads or delivers cargo during the voyage. A demand may not be made before the expiration of 5 days from the beginning of the voyage, not more than once in 5 days, and not more than once in the same port on the same entry. If a master does not comply with this subsection, the seaman is released from the agreement and is entitled to payment of all wages earned. Notwithstanding a release signed by a seaman under section 10312 of this title, a court having jurisdiction may set aside, for good cause shown, the release and take action that justice requires. This subsection does not apply to a fishing or whaling vessel or a yacht.

(f) At the end of a voyage, the master shall pay each seaman the balance of wages due the seaman within 24 hours after the cargo has been discharged or within 4 days after the seaman is discharged, whichever is earlier. When a seaman is discharged and final payment of wages is delayed for the period permitted by this subsection, the seaman is entitled at the time of discharge to one-third of the wages due the seaman.

(g) When payment is not made as provided under subsection (f) of this section without sufficient cause, the master or owner shall pay to the seaman 2 days' wages for each day payment is delayed.

(h) Subsections (f) and (g) of this section do not apply to a fishing or whaling vessel or a yacht.

(i) This section applies to a seaman on a foreign vessel when in a harbor of the United States. The courts are available to the seaman for the enforcement of this section.

46 U.S.C. §10314
Advances

(a)(1) A person may not –

(A) pay a seaman wages in advance of the time when the seaman has earned the wages;

(B) pay advance wages of the seaman to another person; or

(C) make to another person an order, note, or other evidence of indebtedness of the wages, or pay another person, for the engagement of seamen when payment is deducted or to be deducted from the seaman's wage.

(2) A person violating this subsection is liable to the United States Government for a civil penalty of not more than $500. A payment made in violation of this subsection does not relieve the vessel or the master from the duty to pay all wages after they have been earned.

(b) A person demanding or receiving from a seaman or an individual seeking employment as a seaman, remuneration for providing the seaman or individual with employment, is liable to the Government for a civil penalty of not more than $500.

(c) This section applies to a foreign vessel when in waters of the United States. An owner, charterer, managing operator, agent, or master of a foreign vessel violating this section is liable to the Government for the same penalty as an owner, charterer, managing operator, agent, or master of a vessel of the United States for the same violation.

(d) The owner, charterer, managing operator, agent, or master of a vessel seeking clearance from a port of the

United States shall present the agreement required by section 10302 of this title at the office of clearance. Clearance may be granted to a vessel only if this section has been complied with.

(e) This section does not apply to a fishing or whaling vessel or a yacht.

46 U.S.C. §10315
Allotments

(a) Under prescribed regulations, a seaman may stipulate as follows in the agreement required by section 10302 of this title for an allotment of any part of the wages the seaman may earn:

(1) To the seaman's grandparents, parents, spouse, sister, brother, or children;

(2) to an agency designated by the Secretary of the Treasury to handle applications for United States savings bonds, to purchase bonds for the seaman; and

(3) for deposits to be made in an account for savings or investment opened by the seaman and maintained in the seaman's name at a savings bank or a savings institution in which the accounts are insured by the Federal Deposit Insurance Corporation or the Federal Savings and Loan Insurance Corporation.

(b) An allotment is valid only if made in writing and signed by and approved by a shipping commissioner. The shipping commissioner shall examine allotments and the parties to them to enforce compliance with the law. Stipulations for allotments made at the beginning of a voyage shall be included in the agreement and shall state the amounts and times of payment and the person to whom payments are to be made.

(c) Only an allotment complying with this section is lawful. A person falsely claiming qualification as an allottee under this section is liable to the United States Government for a civil penalty of not more than $500.

(d) The owner, charterer, managing operator, agent or master of a vessel seeking clearance from a port of the

United States shall present the agreement at the office of clearance. Clearance may be granted to a vessel only if this section has been complied with.

(e) This section applies to a foreign vessel when in waters of the United States. An owner, charterer, managing operator, agent, or master of a foreign vessel violating this section is liable to the Government for the same penalty as an owner, charterer, managing operator, agent, or master of a vessel of the United States for the same violation.